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THE POSITION OF AN ATHLETE IN SPONSORSHIP CONTACTS REGARDING OLYMPIC GAMES

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Sponsorship of individual athletes is not mainly based on intellectual industrial rights, but rather rests more on personal rights. As they are athletes involved in international competitions, they must adhere to the rules of various organisations. If an athlete wants to participate in Olympic Games, then s/he is obliged to respect the rules of IOC and NOC, and sign the Olympic Declaration which includes the code of suitability. Rule 40 of the Olympic charter is the key provision which must be respected throughout the Olympic Games.

In Germany in the Bundeskartellamt (BKA) case of 2017, an administrative procedure was initiated against the German Olympic Sport Confederation and the IOC which revealed that the current application of rule 40 of the Olympic charter for athletes and sponsors in Germany limited competition and that DOSB and IOC are abusing their dominant position. The decision was based on the specific German legal context and does not apply to other jurisdictions. This means that the new rules of DOSB in general are not applicable to other NOCs. DOSB and IOC proposed changes to their rules. IOC warned that widening new DOSB directions would threaten financial mechanisms of Olympic solidarity and the organisation of true global games with global participation.

The pressure of top athletes, particularly from commercial sport, will grow and we can expect more intensive future discussions at both international and national levels. IOC and NOC will have to change the approach towards athletes on the one hand and not disregard the principle of solidarity towards most athletes who come from underdeveloped parts of the world and from not so media attractive sports.

Key words: *sponsorship, athlete, Olympic games*

INTRODUCTION

In the recent years we are facing the emerging interests of different stakeholders in sport. Globalization, development of modern technologies, commercialization, increasing investment of capital, emphasized individual approach, the neglect of the principle of solidarity in sport and some other elements have brought new initiatives which are reflecting different positions and platforms of different subjects.

As athletes are the core of sport and the Olympic movement it is interesting to find out and recognize the initiatives coming from their side. It brings new considerations which are challenging for different spheres including sports law.

Apart from sponsorship of sports organizations, sponsorship of individual athletes have another specific nature as they are mostly not based on intellectual industrial rights but rely more on personal property rights. After analyzing the elements of some of the NOC sponsorship contracts,¹ we can find out some interesting facts regarding the legal nature of this contract. Like some other inominative modern contracts, sponsorship agreement is a special *sui generis* contract.² Some sponsorship contracts have similarities with licensing as the main object of the contract is an intellectual right. The TOP³ and the NOC contracts are based on the value of the Olympic rings. The image of the Olympic rings as a world famous trade mark makes the essence of the contract in a way which looks as it would be a licensing agreement. A closer look into the structure of the TOP contract proves the thesis of making a distinction between this sponsorship agreement and an ordinary licensing contract.⁴

The basic difference lies in the way how the object of the contract is used. As a licensee is trying to use the trade mark itself, the sponsor is trying to connect the trade mark with his own name, brand or product. It is very common that sponsors use the Olympic rings together with their own brand names and logos (a composite logo) trying to raise the image and value of their own brand. Beside the elements which are very close to the elements of a licensing agreement, the TOP agreement gives a sponsor many other rights which are not common for an ordinary licensing agreement. Some of the elements (ticketing, hospitality, and merchandising) are also structural parts of a sponsorship agreement. Some elements of other contracts can be found in certain sponsorship agreements, such as sales agreement, lease, labor contract, selling of TV rights, joint venture and some others. The most important fact is that the sole right to use the brand name is only one part of the essence of the contract, far more important is the way how successfully a sponsor uses this intellectual property. One of the most specific and relevant elements is the exclusivity of sponsors. A sponsorship contract has developed exclusivity as a special element of distinction between the sponsors which are recognized by the public as a close link with the sponsored subject and other commercial concurrent in its brand. On the other side "ambush marketing"⁵ is a very specific attempt to diminish the value of sponsorship and NOCs have been developing special ways and legal means of how to protect and defend sponsorship property from it.

¹ NOC of Austria, Germany, Great Britain and Slovenia.

² Jagodic, Bednarik; Structural elements and definition of a sponsorship contract in sport, *Kineosologija Slovenica*, nr. 22, 1, p. 5-15., Faculty for sport, Ljubljana, 2016.

³ TOP – abbreviation for the »The Olympic Programme« as the key commercial programme of the International Olympic Committee sponsors.

⁴ See also Jagodic (2007), *Pravne značilnosti sponzorskih pogodb v olimpijskem gibanju*, (Legal characteristics of sponsorship contracts in Olympic movement), Pravna fakulteta v Ljubljani.

⁵ See also Jagodic, Mateša, *The legal aspects of ambush marketing*, Conference of sports law, Faculty of Law Split, 2018.

SOME CASES OF SPONSORSHIP IN PRACTICE

THE OLYMPIC PROGRAMME (TOP)

Marketing programme of IOC was created after the Olympics in Los Angeles in 1984 and became one of the key factors of the great value and importance of IOC today. The legal nature of the TOP contract is a very unique one. Basically, it is a sponsorship agreement with all structural elements of any sponsorship. The strength of the TOP sponsorship programme is evident in the fact that the programme enjoys one of the highest sponsorship renewal rates of any sports property. TOP companies receive exclusive marketing rights and opportunities within their designated product category. They may exercise these rights on a worldwide basis, and they may develop marketing programmes with the various members of the Olympic Movement - the IOC, the NOC`s, and the Organizing Committees.

In addition to the exclusive worldwide marketing opportunities, partners receive:

- use of all Olympic imagery, as well as appropriate Olympic designations on products hospitality opportunities at the Olympic Games
- direct advertising and promotional opportunities, including preferential access to Olympic broadcast advertising
- on-site concessions/franchise and product sale/showcase opportunities
- ambush marketing protection
- acknowledgement of their support through a broad Olympic sponsorship recognition programme⁶

What makes the TOP contract so special?

First of all, it is the nature of the contract and the subjects it involves. The TOP contract is one of those contracts known in international law as the contracts with a special character. It is multinational and requires a very clear definition of the legal system which is used for different partners from different countries. The TOP consists of many single contracts, like a puzzle, and involves a lot of subjects of very different legal status. That is very characteristic of the TOP and it makes the whole system very interesting in legal sense. It consists of many documents that are necessary to examine in order to understand the relationship correctly. Undoubtedly, the TOP represents a complex system of connected contracts, which must be adjusted. The signing of the contract requires well-developed formal procedures and sophisticated and logistically well organized procedure. The timing of the signings of different partners might be of the extreme importance for the whole system itself. A special way of the allocation of the money that comes out of the contract is not typical for an ordinary contract. In this sense, the IOC has

⁶ www.olympic.org

developed a very sophisticated system /"Olympic Solidarity"/ which includes some hundreds of beneficiaries. Through that, the Olympic Solidarity is also part of the TOP system. On the part of the sponsors, the exclusivity of sponsors has been developed in a very sophisticated way where also many elements from the economy were used. Certainly, there are also other elements to be examined in this contract from the aspect of the law.

TOP program consists of many contracts. Primarily IOC and TOP sponsors sign tripartite contracts with NOC-s. Apart from that each NOC signs contracts with its own national sponsors, but these contacts must observe rights and obligations of initial TOP contracts. These are secondary contracts but it is essential to find out, that the system can only work if all contracts are "compatible".

QUESTIONS RELATED TO SPONSOR OF AN INDIVIDUAL ATHLETE REGARDING ARRANGEMENTS OF OTHER

As an athlete is preparing for important international competitions he is engaged in legal relations with different partners. He is connected with sport club, national and international federation, NOC and IOC, and the sponsors of all of them. As Fasel⁷ underlines a professional athlete has loyalties to his sport, club, national team, fans, agent, sponsors and players union. That can create problems if the relations are not very clear and precisely formulated. If he wants to take part in the international sports competitions he becomes a part of different sport systems and has to follow particular obligations. There are some open legal questions like

- Who is the owner of commercial rights of international sports competitions?
- What is the legal nature of image right of an individual athlete, what is his/her right regarding personal clothing?
- How it is possible to solve the possible conflict of interests of different sponsors of sports subjects?

EXAMPLE OF "OLYMPIC GAMES CONTRACT" OF NOC

Commercialization of sport has merged sport and business. Nearly all important sport subjects have their own sponsors with different interests. Sport subjects come into different relationship. An athlete could be a member of his club, a national federation (NF) and NOC of his county. As all of them have their own sponsors it is necessary to find a solution how to preserve rights of all mentioned sport subjects, as they are all important for "sports reproduction".

⁷ Presentation of Rene Fasel, »Who owns the ice hockey players«, EOC Technical seminar, Ljubljana, October 2005.

There are different models and ways how to tackle the problem of conflict of commercial interests of different subjects in the period of preparation for the Olympic Games. Many NOC`s try to establish the proper relations with a federation and an athlete signing an agreement in the period of preparation for the Games.⁸ There are two general ways. In some cases NOC sign a separate contract with the federation (NOC of Norway) and an athlete (NOC of Great Britain, Norway, Netherland, Belgium) or include all parties in the same contract (NOC of Latvia, NOC of Slovenia). In this case it is tripartite agreement with rights and obligations of NOC, national federation and an athlete. In the case of Belgian NOC federation gets a copy of signed agreement between NOC and an athlete.

It is interesting to examine the reasons of NOC Latvia not so sign a separate agreement with the national federation or an athlete but to make three partite contracts. In occasion of a contract with federations, they are solving their financial problems on athlete`s account (getting money for funding athletes from NOC directly), financially and morally manipulate “disobedient” athletes, financial flow is not coordinated, NOC control over sports work, attraction of sponsor funding and advertising disappear. In case of a contract with the athlete negative impacts are recognized such as uncoordinated financial flow, coaches and federations are ignored, undecided belonging of purchased inventory, unregulated advertising activities, responsibilities and control of NF disappear.

Basic criteria to select an athlete to be included in the contract is set by the NOC and is based on achieved certain sport results. After signing of a contract an athlete gets a status of an Olympic candidate or a member of an Olympic team, which brings him some rights and obligations. NOC of Slovenia signs 3 partite contract (NOC, NF and an athlete) in which the athlete is entitled in the preparation period to get special rights such as logistical support, financial support via national federation, pocket money (scholarship, funding), health care and special health insurance, training measurement at National Institute for sport, consultations in legal and marketing matters. In the period of competition an athlete is entitled to clothing and equipment, transportation accommodation and accreditation, medical and physical therapeutical care, lawyers costs in possible legal procedures, pocket money and prize money in case of getting a medal.

On the other side an athlete is obliged to obey IOC and NOC rules, sign Olympic declaration which includes eligibility code, make every effort to achieve best result, follow the instructions of a team leader, respect fair and decent behavior towards Olympic team, NOC, sponsors, and obey anti doping rules and ignore attempts of doping. Similar obligations and rights of an athlete are stipulated also in the other contracts of NOC.

⁸ During EOC Technical seminar in October 2005 in Ljubljana »Who owns the athlete« NOC`s of Great Britain, Netherland, Belgium, Latvia, Norway and Slovenia presented their models of contracts with National federations and athletes.

COMMERCIAL OBLIGATIONS OF AN ATHLETE

NOC usually sign a contract with the athletes, preparing for Olympic Games through the view of commercial obligations of an athlete. Regarding his relation with his sponsors an athlete is obliged to obey IOC rules regarding advertisements. He is obliged to inform NOC about his personal sponsors, to wear official Olympic clothes, to allow that NOC use his image for promotion of NOC sponsors, to follow instructions of medal ceremonies protocol and fulfill some other common obligations. If an athlete does not respect those rules it is the NOC which is under pressure by its sponsors and has to take a proper activity not to harm its own position.

POSITION OF AN ATHLETE AND IOC ELIGIBILITY CODE

The system of behavior of the athlete during the period of the Olympic games is regulated in Olympic Charter. The right of NOC to send an athlete to Olympic Games is coming from the IOC Olympic Charter on one hand and on the other NOC has the right over its own Olympic symbols as an intellectual property right, which is transferable to its sponsors.

A typical case of limitations caused by the rules of governing sport organizations which reflects interests of individual athlete and its sponsor is the IOC "eligibility rule." It governs the participation of athletes in the Olympic Games and contents the basic information on the Olympic Rules and Regulations including the WADA Anti Doping Code and refers to the Court of Arbitration for Sport. Eligibility Code is the basic element not only for participation of athletes in Olympic Games but also for the cooperation between athletes, their NOCs and their stakeholders.

Eligibility rule (rule 40 of the Olympic Charter) sets criteria to get Olympic accreditation.⁹ To be eligible for participation in the Olympic Games, a competitor, coach, trainer or other team official must comply with the Olympic Charter as well as with the rules of the IF concerned as approved by the IOC, and the competitor,

⁹ Rule 40 of the Olympic Charter

»To participate in the Olympic Games, a competitor, team official or other team personnel must respect and comply with the Olympic Charter and World Anti-Doping Code, including the conditions of participation established by the IOC, as well as with the rules of the relevant IF as approved by the IOC, and the competitor, team official or other team personnel must be entered by his NOC.«

Bye-law to Rule 40

1. Each IF establishes its sport's rules for participation in the Olympic Games, including qualification criteria, in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval.

2. The application of the qualification criteria lies with the IFs, their affiliated national federations and the NOCs in the fields of their respective responsibilities.

3. Except as permitted by the IOC Executive Board, no competitor, team official or other team personnel who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.

coach, trainer or other team official must be entered by his NOC. The above-noted persons must notably:

- respect the spirit of fair play and non violence, and behave accordingly; and
- respect and comply in all aspects with the World Anti-Doping Code.

As it is stated in Bye-law to Rule 40, each IF establishes its sport's own eligibility criteria in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval. The application of the eligibility criteria lies with the IFs, their affiliated national federations and the NOCs in the fields of their respective responsibilities.

The commercial use of athlete images during the Games may only be made in a congratulatory or generic manner. Such communications may not refer directly to the use of any product or service that enhances performance in practicing or competing in sport and may not refer to the competitor's performance at the Games, except in the case of congratulatory communications. At no time can the use of an athlete's name, image or likeness be used to make reference to the official product of the athlete. Reference to the athlete's biography may be used in a factual manner. The athletes must appear dressed in either his or her National Team uniform, past Games National Olympic team uniforms or in generic, unbranded clothing. Athletes may not be dressed in a uniform that is branded with the sponsor's trademarks or any other commercial mark other than approved manufacturer trademark.¹⁰

Eligibility Code might be problematic from the standpoint of the right of an athlete. If he does not agree with the Code he is not permitted to take part at the Olympic Games. After Medina Majcen¹¹ case it is questionable what would be the position of ECJ if the Code would be examined. The importance of Medina Majcen case is obvious as even The White Paper on Sport which was issued by Commission of European Communities¹² points out to the judgment. In the Chapter 4.1. it is stated that specify of sport has to be taken into consideration in the sense that restrictive effects on competition that are inherent in the organization and proper conduct of competitive sport are not in breach of EU competition rules, provided that these effects are proportionate to a legitimate genuine sporting interest pursued. The necessity of a proportionality test implies the need to take into account the individual features of each case. It does not allow for the formulation of general guidelines on the application of competition law to the sport sector.

It is obvious that the Code creates fundamental criteria for the athletes to be able to compete at Olympic Games. A competition of an individual athlete at Olympic Games is not purely of a sporting nature but could also be regarded as an activity with economic consequences. If anti doping rules could be the subject of Community Law as regarded in Medina Majcen case it would mean that also other

¹⁰ Presentation of IOC managing Director Timo Lumme, »Changes and Challenges within the Olympic Market«, EOC Technical seminar, Ljubljana, October 2005.

¹¹ T 313/02 and C 519/04 Meca Medina Majcen v Commission.

¹² White paper on Sport was issued on 11.7.2007 by EU Commission, COM(2007) 391 final, www.europa.eu/sport.

purely sporting rules such as IOC Eligibility Code per se could not be excluded from common rules. In the other words restrictions involved in Eligibility Code should be inherent and proportionate with regard to the sporting objectives pursued.

It means that different rights might be in conflict. An image right of an athlete represents his/her own personal right on one side, while on the other side the rights of sporting organizations are based on intellectual property rights. IOC original right of use of Olympic image has its background in Nairobi treaty of protection of Olympic symbol.¹³ IOC grants the use of the word Olympic to NOC in the contract which is integrated in TOP program. Olympic emblem shall mean a design, as approved by the IOC, integrating the Olympic symbol with another distinctive element. Olympic designations shall mean any or all of the designations which indicate a sponsor relationship with a member of the Olympic Movement or an Olympic Team, such as »Official Partner, Sponsor, Supplier, Licensee, Product, Service of ...¹⁴

In praxis some NOC (Great Britain, Netherlands, and Belgium) implicitly regulate the transfer of image (portrait) right for the use of NOC during the Games. Without athlete permission it would not be possible to commercially exploit his/her image right, NOC would not be able to use athlete's images for the commercial purposes of its sponsors.

CASE IN GERMANY AND THE EXPLANATION OF THE OLYMPIC CHARTER RULE 40

In 2017 an interesting case was carried out in Germany. The Bundeskartellamt (BKA) as an official authority to control monopolies in Germany has conducted an administrative proceeding against the German Olympic Sports Confederation (Deutscher Olympischer Sportbund -DOSB) and the IOC. The proceeding was initiated on the basis of a complaint by the Federal Association of the German Sports Goods Industry and in connection with press reports related to the Olympic Games. BKA found out that the current application of Rule 40 of the Olympic Charter for athletes and sponsors in Germany restricts competition and that DOSB and IOC are abusing their dominant position. BKA found out that the rules of DOSB and IOC were too restrictive. It was explained that the advertising restriction on athletes and companies could constitute an abuse of the dominant position of DOSB and IOC. Account was taken of the fact that the athletes as the performers in the Olympic Games do not benefit directly from the very high advertising revenues generated by the official Olympic sponsors

According to the DOSB Guidelines ("DOSB Guidelines 2016") on Rule 40, only promotional activities that began at least three months before the start of the Olympic Games and did not contain well defined Olympic related terms could be

¹³ »Nairobi treaty on the protection of the Olympic symbol«, was issued on 26.9.1981 in Nairobi.

¹⁴ Definition from the contract between IOC and NOC.

approved. DOSB and IOC offered to loosen the previous restrictions on advertising activities exclusively targeted at Germany by means of some commitments. DOSB and IOC have proposed amendments to their rules and offered more scope for action. BKA had presented these commitments to various companies, associations and also athletes for their comments. Nevertheless, the revised DOSB rules were provisionally used in the run up to the Winter Games in Pyeongchang 2018.

It was concluded that the standard for advertising measures should be the *Olympiaschutzgesetz* (Olympic Protection Act) and the case law of the German Federal Court of Justice. The IOC promised to modify the guidelines on Rule 40 which should be limited in their application and the rules for the approval of applications should be amended. The deadline were significantly reduced not constitute a cut-off period. The names of “Olympic” and other Olympic related terms were defined conclusively and in a much narrower way. Generic advertising, as well as greetings or congratulatory messages from the sponsors to athletes were also permitted during the “frozen period” under certain conditions. According to the proposed commitments, athletes were able to share or retweet content from the IOC / OCOG / DOSB / or Team Germany and also to link it with greetings or acknowledgments to the sponsors.

BKA also carried out a market test on the proposed commitments by means of surveys addressed to associations, athletes and sponsors (especially the sporting goods industry). The changes in the new 2016 DOSB Guidelines were subject to the outcome of the market test and were, therefore, provisional. The revised rules were less restrictive for athletes and sponsors and were used during the Winter Games in Pyeongchang in February 2018 instead of the previous ones.

IOC explanation of the case was quite pragmatic. It stated the possibility of increased flexibility for athlete marketing campaigns during the Olympic Games 2018. IOC declared that it had to adapt to the opportunities to evolving marketing landscape. Athletes’ Rights and Responsibilities Declaration aspires to promote the ability and opportunity of athletes to leverage opportunities to generate income in relation to their sporting career, name and likeness, whilst recognizing the intellectual property or other rights, rules of the event and sports organisations as well as the Olympic Charter. IOC pointed out that the decision also encourages athletes to respect the solidarity principle of the Olympic Movement, which allows assistance and support to be provided among athletes and members of the Olympic Movement

It was also underlined that the decision was based upon specific German legal context and that BKA principles and decision do not apply to other jurisdictions meaning that new DOSB rules are not generally applicable to other NOCs. The decision recognised legitimate reasons for restricting individual athletes’ advertising opportunities to ensure ongoing organisation of the Olympic Games. IOC also warned that the extension of new DOSB guidelines would endanger Olympic solidarity funding mechanisms and the organisation of truly global Games with global participation.

CONCLUSION

The best way to solve the possible conflict of interests of different sponsors of sports subjects are agreements which should be reached on time. Preparation period for Olympic Games is an ideal opportunity for the stakeholders of such a mission to solve the possible problems on time. The praxis of different NOC preparing contracts with NF and athletes proves that very effectively. An athlete is regarded as a contractual party with his/her rights and can solve the relations with his/her business related partners in due time.

The holder right which is linked to sport competition is the most important. As a clear example of autonomous sports law it is obvious that the governing body of particular sport is entitled to settle the rules which all involved subjects have to obey. After Medina Majcen case it is of course important to follow European Court of Justice Principle that all sport rules are subject to Community Law. In view of the restrictions they cause, rules set by sporting organizations are inherent and proportionate with regard to the sporting objectives pursued. There might also be restrictions if those rules would be in the conflict with the basic principles of human or some other common rights. As far as those basic principles are not touched, the autonomy of sport is secured.

The German case will undoubtedly have impact to future relationship between athletes and other stakeholders in the Olympic movement. The models to solve possible conflict have to be modified in both directions. The pressure from top athletes especially from commercial sports will grow and we can expect intensive future discussions on the international and national level. IOC and NOCs will have to modify the approach towards athletes on one side and do not neglect the principle of solidarity towards the majority of athletes which come from not developed parts of the world and from not very media attractive sports. If the right compromise will not be reached the difference between rich and poor sports and athletes, privileged and the other not so developed sports will increase what will make the co existence in the world of sport much more difficult.

POLOŽAJ SPORTAŠA U SPONZORSKIM KONTAKTIMA VEZANIM ZA OLIMPIJSKE IGRE

Sponzorstva pojedinačnih sportaša uglavnom se ne temelje na intelektualnim industrijskim pravima, već se više oslanjaju na prava osobne svojine. Kako su sportaši uključeni u međunarodna natjecanja, moraju se pridržavati pravila različitih organizacija. Ako sportaš želi sudjelovati na Olimpijskim igrama dužan je poštivati pravila MOK-a i NOC-a, te potpisati olimpijsku deklaraciju koja uključuje šifru podobnosti. Pravilo 40. Olimpijske povelje ključna je odredba koja se mora poštivati tijekom olimpijskih igara.

U Njemačkoj je u slučaju Bundeskartellamt (BKA) iz 2017. pokrenut upravni postupak protiv Njemačke olimpijske sportske konfederacije i MOO-a koji je otkrio da trenutna primjena pravila 40. Olimpijske povelje za sportaše i sponzore u Njemačkoj ograničava natjecanje te da da DOSB i MOK zloupotrebljavaju svoj dominantni položaj. Odluka se temeljila na specifičnom njemačkom pravnom kontekstu i ne odnosi se na druge jurisdikcije, što znači da nova pravila DOSB-a općenito nisu primjenjiva na ostale NOO-ove. DOSB i MOC predložili su izmjene svojih pravila. MOK je upozorio da će proširenje novih DOSB-ovih smjernica ugroziti mehanizme financiranja olimpijske solidarnosti i organizaciju istinski globalnih igara s globalnim sudjelovanjem.

Pritisak vrhunskih sportaša, posebno iz komercijalnog sporta, rasti će i možemo očekivati intenzivne buduće rasprave na međunarodnoj i nacionalnoj razini. MOO i NOC morat će izmijeniti pristup prema sportašima s jedne strane i ne zanemariti načelo solidarnosti prema većini sportaša koji dolaze iz nerazvijenih dijelova svijeta i iz ne baš medijski atraktivnih sportova.

Ključne riječi: *sportaši, sponzorski ugovori, Olimpijska povelja*